



LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 202

[Docket No. 2017-8]

Secure Tests

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Interim rule with request for comments.

SUMMARY: The U.S. Copyright Office is issuing an interim rule amending its regulations governing the registration of copyright claims in secure tests in order to address a disruption caused by the COVID-19 pandemic. The Office has become aware that certain examinations that normally would qualify for registration as secure tests may be ineligible for this option because they currently are being administered remotely rather than at specified testing centers. The interim rule allows otherwise-eligible tests that are administered online during the national emergency to qualify as secure tests, provided the test administrator employs sufficient security measures. In addition, the Office is requesting public comment on the technological requirements needed for examination of secure test claims via secure teleconference. Finally, the Office is announcing its intention to issue guidelines according to which parties may request *ex parte* meetings with the Office in this proceeding.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be made in writing and must be received by the U.S.

Copyright Office no later than [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office website at <https://copyright.gov/rulemaking/securetests>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, regans@copyright.gov; Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, rkas@copyright.gov; Kevin R. Amer, Deputy General Counsel, kamer@copyright.gov; or David Welkowitz, Attorney Advisor, dwelkowitz@copyright.gov. They can be reached by telephone at 202-707-3000.

SUPPLEMENTARY INFORMATION:

I. Background

Under Section 408 of the Copyright Act, the U.S. Copyright Office is responsible for registering copyright claims.¹ In so doing, the Office is obligated to obtain a registration deposit that is sufficient to verify the claim and to provide an archival record

¹ 17 U.S.C. 408.

of what was examined and registered.² Deposits of unpublished material must be kept for the full term of copyright protection,³ and deposits are available for public inspection.⁴ The Act, however, authorizes the Office to issue regulations establishing “the nature of the copies . . . to be deposited” in specific classes of works and to “permit, for particular classes, the deposit of identifying material instead of copies or phonorecords.”⁵

Pursuant to that authority, the Office has long provided special registration procedures for “secure tests” that require the maintenance of confidentiality of their contents. These include tests “used in connection with admission to educational institutions, high school equivalency, placement in or credit for undergraduate and graduate course work, awarding of scholarships, and professional certification.”⁶ Current regulations define a secure test as “a nonmarketed test administered under supervision at specified centers on scheduled dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage following each administration.”⁷

On June 12, 2017, the Office issued an interim rule (the “June 2017 Interim Rule”) that memorialized certain aspects of its secure test procedure and adopted new processes to increase the efficiency of its examination of such works.⁸ Under this rule, applicants must, among other things, submit an online application, a redacted copy of the entire test,

² *Id.* 408(b), 705(a).

³ *Id.* 704(d)

⁴ *Id.* 705(b).

⁵ *Id.* 408(c)(1).

⁶ 42 FR 59302, 59304 & n.1 (Nov. 16, 1977); *see also* 43 FR 763, 768 (Jan. 4, 1978) (adopting the definition of a secure test).

⁷ 37 CFR 202.13(b)(1).

⁸ 82 FR 26850 (June 12, 2017); *see* 37 CFR 202.13, 202.20(b)(3), (c)(2)(vi) (implementing the June 2017 Interim Rule).

and a brief questionnaire about the test through the electronic registration system.⁹ This procedure allows the Office to prescreen an application to determine whether the work appears to be eligible for registration as a secure test. If the test appears to qualify, the Office will schedule an in-person appointment for examination of an unredacted copy of the test.¹⁰

During the in-person meeting, the examiner will review the redacted and unredacted copies in a secure location in the presence of the applicant or his/her representative.¹¹ If the examiner determines that the relevant legal and formal requirements have been met, he or she will register the claim(s) and add an annotation to the certificate reflecting that the work was examined under the secure test procedure. The registration is effective as of the date that the Office received in proper form the application, questionnaire, filing fee, and the redacted copy that was uploaded to the electronic registration system.¹² The June 2017 Interim Rule thus gives publishers the benefit of establishing as their effective date of registration the date when those materials are submitted to and received by the Office electronically, rather than the later date when the in-person examination takes place.

On November 13, 2017, in response to concerns raised by stakeholders following the June 2017 Interim Rule, the Office issued a second interim rule (the “November 2017 Interim Rule”) to permit registration of a group of test items (*i.e.*, sets of questions and

⁹ 37 CFR 202.13(c)(2).

¹⁰ *Id.*

¹¹ The applicant must bring to the meeting, among other materials, a signed declaration confirming that the redacted copy brought to the meeting is identical to the redacted copy that was uploaded to the electronic registration system. *Id.* 202.13(c)(3)(iv).

¹² 82 FR at 26853.

answers) stored in a database or test bank and used to create secure tests.¹³ For these works, the November 2017 Interim Rule adopted most of the same registration procedures that apply to secure tests under the June 2017 Interim Rule.

The Office invited public comment on both the June 2017 and the November 2017 Interim Rules. The Office received a total of thirty-nine responses from a wide variety of testing organizations and other interested parties.¹⁴

II. The Interim Rule

While the Office is continuing to evaluate the secure tests regulations as a whole to determine whether changes may be warranted before issuing a final rule, it is issuing an additional interim rule at this time to address a specific disruption currently affecting test publishers' ability to exercise this option. The Office has become aware that, as a result of the COVID-19 pandemic, certain tests that normally are administered with test-takers physically assembled at one or more locations will instead be administered remotely, with test-takers completing the exam online from their homes. Publishers have expressed concern that this change may make the tests ineligible for registration as secure tests, as they will not be administered "at specified centers."¹⁵ As a result, these publishers may be forced to choose between registering their tests under the normal procedure for literary works (thus forfeiting confidentiality) and either delaying registration until they can administer the test according to the existing rule or foregoing copyright registration altogether. If a publisher chooses to delay registration, it could lose

¹³ 82 FR 52224 (Nov. 13, 2017). *See* 37 CFR 202.4(b), (k), 202.13 (implementing the November 2017 Interim Rule).

¹⁴ The public comments in this proceeding may be accessed from the Office's website at <https://www.copyright.gov/rulemaking/securetests/>.

¹⁵ 37 CFR 202.13(b)(1).

the benefit of an earlier effective date of registration. Although the building that houses the Copyright Office is currently closed to the public and therefore staff are unable to conduct in-person examinations or issue registrations for secure tests, as noted above, an eligible secure test publisher can establish an effective date of registration during this time by electronically submitting an application, questionnaire, filing fee, and redacted copy to the Office.¹⁶

The interim rule amends the regulations to provide an accommodation for tests that would be eligible for secure test registration but for the pandemic. The rule provides that an otherwise-qualifying test shall be considered a secure test if it normally is administered at specified centers but is being administered online during the national emergency, provided the test administrator employs measures to maintain the security and integrity of the test that it reasonably determines to be substantially equivalent to the security and integrity provided by in-person proctors. The rule does not specify particular measures that are required to meet this standard, as the Office believes that publishers generally should have flexibility to tailor such processes to their specific needs. But as examples, the Office expects that sufficient measures typically would include some combination of video monitoring and/or recording, the disabling of certain functions on test-takers' computers (*e.g.*, copying and pasting), technological measures to prevent access to external websites and other prohibited materials, and identity verification of the individual taking the test. It also should be noted that the interim rule does not alter the

¹⁶ See 17 U.S.C. 412.

requirement that a secure test be administered “under supervision,” which means that “test proctors or the equivalent supervise the administration of the test.”¹⁷

The rule also makes a clarifying change to the portion of the definition concerning the storage of secure tests. The current language requires all copies of a secure test to be “either destroyed or returned to restricted locked storage following each administration.”¹⁸ To make clear that this provision does not preclude the retention of digital copies, the interim rule provides that copies also may be returned to “secure electronic storage.”

As the wording of the interim rule makes clear, the modification of the definition of secure tests is temporary, lasting only until the COVID-19 emergency ends. The Office is providing this flexibility to ensure that test administrators can continue to offer socially valuable secure tests during the national emergency. This accommodation should not be seen as determinative of the final rule in this proceeding, which will be established on the basis of the overall rulemaking record. The Office recognizes, however, that the “specified centers” limitation was a concern for many test publishers even before the emergency, with several commenters in this proceeding urging the Office to amend that language to facilitate a broader range of testing models. The Office therefore will monitor the operation of the interim rule to help it evaluate whether and under what conditions remote testing should be permitted under the secure tests regulations once the emergency period ends.

In light of the ongoing national emergency, the Copyright Office finds good cause to publish these amendments as an interim rule effective immediately, and without first

¹⁷ 37 CFR 202.13(b)(3).

¹⁸ 37 CFR 202.13(b)(1).

publishing a notice of proposed rulemaking, “because of the demonstrable urgency of the conditions they are designed to correct.”¹⁹

III. Request for Comments

As noted, the Office is currently unable to conduct in-person examination of secure test applications. The Office is exploring possible options to provide such examinations via secure videoconference. The Office invites comments regarding the technological requirements that would be needed for test publishers to participate in such a process. In particular, the Office is interested in whether examination using the WebEx platform would be acceptable to publishers, as that program is currently supported by the Library of Congress. The Office requests that comments be limited to these topics.

IV. *Ex Parte* Communication

The Office has determined that informal communication with interested parties might be beneficial in this rulemaking, including to discuss how the change implemented by the interim rule has operated in practice. The Office therefore intends to issue guidelines according to which parties may request *ex parte* meetings with the Office in this proceeding. Consistent with its practice in other rulemakings, the Office will establish requirements to ensure transparency, including that participating parties submit a list of attendees and a written summary of any oral communications, which will be posted on the Office’s website. The *ex parte* guidelines will made be available at <https://www.copyright.gov/rulemaking/securetests> when the Office initiates the

¹⁹ H.R. Rep. No. 1980, 79th Cong., 2d Sess. 26 (1946). *See* 5 U.S.C. 553(b)(3)(B) (notice and comment is not necessary upon agency determination that it would be “impracticable, unnecessary, or contrary to the public interest”); *id.* at 553(d)(3) (30-day notice not required where agency finds good cause).

availability of such communications. No *ex parte* meetings in this proceeding will be scheduled before that time.

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List of Subjects in 37 CFR Part 202

Copyright, Preregistration and Registration of Claims to Copyright.

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 202 as follows:

PART 202—PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

1. The authority citation for part 202 continues to read as follows:

Authority: 17 U.S.C. 408(f), 702.

2. Amend § 202.13 by revising paragraph (b)(1) to read as follows:

§ 202.13 Secure tests.

* * * * *

(b) * * *

(1) A *secure test* is a nonmarketed test administered under supervision at specified centers on scheduled dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage or secure electronic storage following each administration. A test otherwise meeting the requirements of this paragraph shall be considered a secure test if it normally is administered at specified centers but is being administered online during the national emergency concerning the COVID-19 pandemic, provided the test administrator employs measures to maintain the security and integrity of

the test that it reasonably determines to be substantially equivalent to the security and integrity provided by in-person proctors.

Dated: May 4, 2020

Maria Strong,
*Acting Register of Copyrights and
Director of the U.S. Copyright Office.*

Approved by:

Carla D. Hayden,
Librarian of Congress.

[BILLING CODE 1410-30-P]

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